IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

KINETIC CONCEPTS, INC., KCI USA, INC., and MEDICAL RETRO DESIGN, INC.,	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. SA-95-CA-755-FB
HILLENBRAND INDUSTRIES, INC., HILL-ROM COMPANY, INC., and HILL-ROM, INC.,	§	
Defendants.	§	

COURT'S INSTRUCTIONS TO THE JURY

I. GENERAL INSTRUCTIONS ON THE TRIAL

MEMBERS OF THE JURY:

In any jury trial there are, in effect, two judges. I am one of the judges; you the jury are the other judge, the judges of the facts. You have heard the evidence in this case. I will now instruct you on the law that you must apply. It is your duty to follow the law as I give it to you. Do not consider any statement that I have made in the course of trial or make in these instructions as an indication that I have any opinion about the facts of this case.

After I instruct you on the law, the attorneys will have an opportunity to make their closing arguments. Statements and arguments of the attorneys are not evidence and are not instructions on the law. They are intended only to assist the jury in understanding the evidence and the parties' contentions.

Answer each question from the facts as you find them. Do not decide who you think should win and then answer the questions accordingly. Your answers and your verdict must be unanimous.

You must answer all questions from a preponderance of the evidence. By this is meant the greater weight and degree of credible evidence before you. In other words, a preponderance of

the evidence just means the amount of evidence that persuades you that a claim is more likely so than not so. In determining whether any fact has been proved by a preponderance of the evidence in the case, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

In determining the weight to give to the testimony of a witness, you should ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact, or whether there was evidence that at some other time the witness said or did something, or failed to say or do something, that was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people may forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was an intentional falsehood or simply an innocent lapse of memory; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given the witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses who testified in this case. You should decide whether you believe all or any part of what each person had to say, and how important that testimony was. In making that decision I suggest that you ask yourself a few questions: Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the plaintiffs or the defendants? Did the witness seem to have a good memory? Did the witness clearly see or hear the things about which he or she testified? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said.

While you should consider only the evidence in this case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in the case.

The testimony of a single witness may be sufficient to prove any fact, even if a greater number of witnesses may have testified to the contrary, if after considering all the other evidence you believe that single witness.

There are two types of evidence that you may consider in properly finding the truth as to the facts in the case. One is direct evidence—-such as testimony of an eyewitness. The other is indirect or circumstantial evidence—-the proof of a chain of circumstances that indicates the existence or nonexistence of certain other facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.

When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field--he or she is called an expert witness--is permitted to state his or her opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether to rely upon it.

In deciding whether to accept or rely upon the opinion of an expert witness, you may consider any bias of the witness, including any bias you may infer from evidence that the expert witness has been or will be paid for reviewing the case and testifying, or from evidence that he or she testifies regularly as an expert witness and his or her income from such testimony represents a significant portion of his or her income.

Certain testimony has been presented to you through depositions. A deposition is the sworn, recorded answers to questions asked a witness in advance of trial. Deposition testimony is entitled to the same consideration and is to be judged by you as to credibility and weighed and

otherwise considered by you insofar as possible in the same way as if the witness had been present and had testified from the witness stand in court.

You will recall that during the course of this trial I admitted some exhibits which contained statements by United States Senators and others, Plaintiffs' Exhibit #0495, and a Department of Justice letter from an Assistant Attorney General, Defendants' Exhibit #335. These exhibits consist of letters and statements written and made by people who are not available to be cross-examined. As with all evidence, these exhibits are not binding on you. As the judges of the facts, you may give these exhibits no weight, some weight, or extensive weight. These opinion exhibits have their genesis from the Attorney General of the United States and staff and from the United States Senate, its staff and witnesses. They are the executive and legislative branches of our government. In the context of this litigation, those branches have no power because you are the judicial branch for fact finding purposes and therefore you possess sole power to decide what weight, if any, to give these and all exhibits.

Any notes that you have taken during this trial are only aids to memory. If your memory should differ from your notes, then you should rely on your memory and not on the notes. The notes are not evidence. A juror who has not taken notes should rely on his or her independent recollection of the evidence and should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollection or impression of each juror about the testimony.

In these Instructions and the Verdict Form Questions, I will refer to Plaintiffs/Counter-Defendants, Kinetic Concepts, Inc. and KCI, USA, Inc., collectively as "KCI." Similarly, I will refer to Defendant Hillenbrand Industries as "Hillenbrand" and Defendants/Counter-Plaintiffs Hill-Rom Company, Inc. and Hill-Rom, Inc. as "Hill-Rom."

You have heard of an entity called Support Systems International or "SSI." SSI was a subsidiary of Hillenbrand that merged with Hill-Rom in 1994.

II. GENERAL INSTRUCTIONS ON THE PARTIES' ANTITRUST CLAIMS

OVERVIEW

KCI asserts that Hill-Rom violated federal and Texas antitrust laws. Hill-Rom asserts that KCI violated the antitrust laws and Texas common law. The purpose of the antitrust laws is to preserve and advance the system of free and open competition and to secure to everyone an equal opportunity to engage in business, trade, and commerce. This policy is the primary feature of the private free enterprise system. The law promotes the concept that free competition produces the best allocation of economic resources. However, it recognizes that in the natural operation of the economic system, some competitors are going to lose business while others prosper. An act becomes unlawful only when it constitutes an unreasonable restraint on interstate commerce.

KCI asserts that Hill-Rom violated the antitrust laws by using its alleged power in the alleged market for standard hospital beds and hospital headwall units to obtain from GPOs and their member hospitals sole-source agreements with Hill-Rom for their specialty bed rentals. KCI asserts that this conduct constitutes attempted monopolization under section 2 of the Sherman Act and the Texas Free Enterprise and Antitrust Act and an unreasonable restraint of trade and unlawful tying under section 1 of the Sherman Act, section 3 of the Clayton Act and the Texas Free Enterprise and Antitrust Act.

Hill-Rom asserts that KCI pursued allegedly factually baseless or "sham" legal claims in court and complaints to the United States Department of Justice and made allegedly false and disparaging statements to customers. Hill-Rom asserts that this conduct constitutes attempted monopolization under section 2 of the Sherman Act. Hill-Rom also asserts that the alleged attempted monopolization constitutes tortious interference with business relations.

SPOLIATION

Hill Rom also contends that its access to evidence relevant or potentially relevant to the matters involved in this lawsuit was substantially hindered by a document destruction program implemented by KCI. KCI, its employees or agents, and its counsel have a duty not to take action

that will cause the destruction or loss of potentially relevant evidence where that destruction or loss of evidence will hinder Hill-Rom from making its own examination and investigation of potentially relevant evidence. When a party has possession of a piece of evidence at a time when it knows or should have known the evidence is relevant or potentially relevant in pending or reasonably foreseeable litigation, the law requires the party in possession to preserve the potentially relevant evidence. If you find in this case that KCI destroyed, made unavailable, or failed to produce documents that it knew or should have known were relevant or potentially relevant to the matters involved in this lawsuit, you may presume, if you feel justified in doing so, that the destroyed or unavailable evidence would have been unfavorable to KCI's theories on its claims and defenses in this case.

RELEVANT MARKET

Before you can determine whether a person has attempted to monopolize or unreasonably restrained competition in a particular line of trade or commerce, you must first determine the "area of effective competition" applicable in this case. In antitrust law, this is known as defining what is called the "relevant market." Charges of attempted monopolization and restraint of trade can only be judged in the framework of the relevant market.

In determining the relevant market, the "area of effective competition" must be determined by reference to a product market and a geographic market. In this case, KCI claims that the relevant product markets within an acute care setting are: (1) the standard hospital beds market; (2) the specialty bed market or submarkets ("the specialty bed market"); and (3) the headwall unit market. Hill-Rom claims that the relevant market is the sale or rental of patient beds with surfaces, including general hospital beds, specialty beds, overlays and mattress replacement systems. Within that alleged product market, Hill-Rom claims that there are submarkets for bariatric products, wound care products, pulmonary products, and rotating treatment table products.

In determining the product market, the basic idea is that the products within it are interchangeable as a practical matter from the buyer's point of view. This does not mean that two products must be identical to be in the same relevant market. It means that they must be, as a matter of practical fact and the actual behavior of consumers, substantially or reasonably interchangeable to fill the same consumer needs or purposes. Two products are within a single market if one item could suit buyers' needs substantially as well as the other. In sum, what you are being asked to do is to decide which products compete with each other.

The relevant market may be either a market or submarket. The boundaries of such a market or submarket may be determined by examining things such as industry or public recognition of the market or submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors. Product clusters and particular categories of customers may also constitute relevant markets or submarkets.

The parties agree that the United States is the relevant geographic market.

ECONOMIC COERCION

To find coercion, you must conclude that Hill-Rom has in effect forced purchasers to buy both hospital beds and specialty beds or headwall units and specialty beds and that any appearance of choice was merely a sham. In determining whether coercion has taken place, it is not enough that Hill-Rom made strong efforts to persuade, encourage, or cajole its customers into buying or renting specialty beds. Nor is it enough that Hill-Rom has given purchasers an economic incentive to buy both hospital beds and specialty beds or headwall units and specialty beds by offering them for sale together at a price more favorable than the combined price if purchased separately.

ATTEMPT TO MONOPOLIZE - KCI CLAIM

KCI asserts that Hill-Rom violated the antitrust laws by allegedly attempting to monopolize the acute care specialty bed market.

To prevail on its attempted monopolization claim, KCI must prove each of the following elements by a preponderance of the evidence:

First, that Hill-Rom engaged in predatory, anticompetitive or exclusionary conduct;

Second, that Hill-Rom had a specific intent to achieve monopoly power in the alleged acute care specialty bed market;

Third, that there was a dangerous probability that Hill-Rom would achieve its goal of monopoly power in the alleged acute care specialty bed market;

Fourth, that Hill-Rom's conduct occurred in or affected interstate commerce; and

Fifth, that KCI was injured in its business or property as a result of the antitrust violation.

EXCLUSIONARY CONDUCT

A practice is exclusionary if it is of the type that tends to impair the opportunities of rivals based on something other than competition on the merits or tends to impair the opportunities of rivals in an unnecessarily restrictive way. In determining whether a business practice is exclusionary you may consider any business justification offered by Hill-Rom. If a firm has attempted to exclude rivals on some basis other than efficiency it is fair to characterize its behavior as predatory.

ATTEMPT TO MONOPOLIZE—MONOPOLY POWER

Monopoly power is the power to control prices in or to exclude competition from the relevant market.

The power to control prices is the power of a company to establish appreciably higher prices for its goods than those charged by competitors for equivalent goods without a substantial loss of business to competitors. Thus, if a company that has raised prices eventually has to lower its prices to the level of prices charged by its competitors, it may not have monopoly power in the sense of power to control prices.

The power to exclude competition means the power of a company to dominate a market by eliminating existing competition from the market or by preventing new competition from entering the market.

MONOPOLY LEVERAGING

As part of its claim of attempted monopolization, KCI asserts that Hill-Rom used monopoly power in the alleged standard hospital bed and headwall unit markets in an attempt to monopolize the alleged acute care specialty bed market. To win on this theory, KCI must establish:

First, that the alleged standard hospital bed market or headwall unit market is a relevant market;

Second, that Hill-Rom has monopoly power in the alleged standard hospital bed or headwall market;

Third, that the alleged standard hospital bed market or headwall unit market is a separate relevant product market from the alleged acute care specialty bed market; and

Fourth, that Hill-Rom used its monopoly power in the alleged standard hospital bed market or headwall unit market in an attempt to monopolize the specialty bed market as defined in the previous instruction styled Attempt to Monopolize.

SPECIFIC INTENT

There are several ways in which KCI may prove that Hill-Rom had specific intent to monopolize. There may be evidence of direct statements of Hill-Rom's intent to obtain a monopoly in the relevant market. Such proof of specific intent may be established by documents prepared by responsible officers or employees of Hill-Rom at about the time of the conduct in question or by testimony concerning statements made by responsible officers or employees of Hill-Rom. You must be careful, however, to distinguish between a party's intent to compete aggressively (which is lawful) and an intent to acquire monopoly power by using predatory, anticompetitive or exclusionary means.

Even if you decide that the evidence does not prove directly that Hill-Rom actually intended to obtain a monopoly, specific intent may be inferred from what Hill-Rom did. For example, if the evidence shows that the natural and probable consequence of Hill-Rom's conduct

in the relevant market was to give Hill-Rom control over prices or to exclude or destroy competition, and that this was plainly foreseeable by Hill-Rom, then you may infer that Hill-Rom specifically intended to acquire monopoly power.

DANGEROUS PROBABILITY OF SUCCESS

In determining whether there was a dangerous probability of success, you should consider the following factors:

First, the market share and power of Hill-Rom as compared to competitors;

Second, whether Hill-Rom's share of the relevant market was increasing or decreasing;

Third, the actual or probable impact on competition of Hill-Rom's alleged predatory, anticompetitive or exclusionary acts or practices; and

Fourth, whether the barriers to entry into the market made it difficult for competitors to enter the market.

A dangerous probability of success need not mean that success was nearly certain. It means that the chance of success was substantial and real; that is, there was a reasonable likelihood that Hill-Rom would ultimately achieve its goal of monopoly power.

UNREASONABLE RESTRAINT OF TRADE

The antitrust laws prohibit contracts, combinations, and conspiracies that unreasonably restrain trade. To establish its claim of unreasonable restraint of trade, KCI must prove the following elements by a preponderance of the evidence.

1. That there were one or more contracts, combinations or conspiracies between Hill-Rom and others;

2. That the contract, combination or conspiracy constituted an unreasonable restraint on interstate commerce in a relevant market;

3. That the restraint involved a substantial amount of such commerce; and

4. That KCI suffered injury in its business or property as a material result of a violation of the antitrust laws.

With regard to the first element, a contract is a written or oral agreement between two or more persons or entities.

The second element is that the alleged contract resulted in an unreasonable restraint on interstate commerce. The question of whether an alleged contract constituted an unreasonable restraint on interstate commerce must be determined on the basis of full consideration of all of the facts and circumstances disclosed by the evidence, including the nature of the particular industry or the product or service involved, the market area involved, any facts that you find to be peculiar to that industry, product, service or market area, the nature of the alleged restraint and its effect, actual or probable, and the history of the circumstances surrounding the alleged restraint and the reasons for adopting the particular practice that is alleged to constitute the restraint. In sum, the reasonableness of a restraint is judged by its general effect on the market, not by the circumstances of a particular application. An individual business decision that is negligent or based on illogical conclusions or insufficient facts is not a basis for antitrust liability under section 1 of the Sherman Act.

The third element is that the alleged contract, combination or conspiracy constituted a restraint on interstate commerce involving a substantial amount of such commerce. The parties agree that interstate commerce is involved. The parties disagree whether a substantial amount of that commerce was affected.

The fourth element is that KCI suffered injury in its business or property as a material result of the alleged contract. In the course of normal lawful competition, some businesses may suffer economic losses or even go out of business. The antitrust laws are violated only when unlawful competitive practices cause such economic losses. Proof of an antitrust violation does not necessarily mean KCI suffered injury from that violation. Further, a plaintiff can recover only if the loss stems from a reduction in competition because of the defendant's behavior. There is no antitrust injury unless the behavior reduced competition, even if the behavior violated the antitrust law at issue.

TYING

A tying arrangement is an agreement by one party to sell a product or service or to give a discount on a product or service (known as the "tying" product) on the condition that the buyer

also purchase or rent a different product (known as the "tied" product) from the seller. KCI asserts that Hill-Rom restrained trade by using "tying" arrangements in its business with group purchasing organizations and their member hospitals. KCI asserts that standard hospital beds and headwall units are the tying products and that specialty beds are the tied products.

Not all tying arrangements are unlawful. The essential characteristic of an invalid tying arrangement is a seller's exploitation of its market power over the tying product to force buyers to purchase or rent a tied product that buyers either did not want at all or might have preferred to purchase or rent elsewhere. When such forcing is present, competition in the market for the tied product may be restricted or foreclosed.

To establish its claim, KCI must prove each of the following elements by a preponderance of the evidence:

First, that standard hospital beds and headwall units are separate and distinct products from specialty beds, and not simply two components of one product;

Second, that there was a contract or agreement in which Hill-Rom agreed to sell standard hospital beds or headwall units or conditioned additional discounts on standard hospital beds or headwall units, the alleged "tying" product, on the condition that the customer also purchase or rent specialty beds, the alleged tied product;

Third, that Hill-Rom had sufficient economic power or significant market leverage in the alleged standard hospital bed or headwall units markets and used that power to force purchases or rentals from Hill-Rom of specialty beds that customers did not want at all or might have preferred to purchase or rent elsewhere to unreasonably restrain free competition in the alleged market for specialty beds;

Fourth, that the alleged tying arrangement foreclosed a not insubstantial volume of commerce. In deciding this question, you must look to the total dollar volume of sales or rentals in interstate commerce by Hill-Rom of the products, if any, that you find to have been tied to standard hospital beds or headwall units;

Fifth, that KCI suffered injury to its business or property as a material result of Hill-Rom's alleged illegal "tying" agreements. The injury, if any, must have been a direct and natural consequence of an illegal "tying" arrangement.

ATTEMPT TO MONOPOLIZE - HILL-ROM'S CLAIM

Hill-Rom claims that KCI attempted to monopolize the alleged submarkets for (1) bariatric products, (2) wound care products, (3) pulmonary products, and (4) rotating treatment table products by pursuing allegedly factually baseless or sham legal claims and making allegedly false and disparaging statements to customers for the purpose of harming competition in those alleged submarkets.

To prevail on its attempted monopolization claim, Hill-Rom must prove each of the following elements by a preponderance of the evidence:

First, that KCI engaged in predatory, anticompetitive or exclusionary conduct;

Second, that KCI had a specific intent to achieve monopoly power in the alleged submarkets;

Third, that there was a dangerous probability that KCI would achieve its goal of monopoly power in the alleged submarkets;

Fourth, that KCI's conduct occurred in or affected interstate commerce; and

Fifth, that Hill-Rom was injured in its business or property as a result of the antitrust violation.

SPECIFIC INTENT

There are several ways in which Hill-Rom may prove that KCI had specific intent to monopolize. There may be evidence of direct statements of KCI's intent to obtain a monopoly in the relevant market. Such proof of specific intent may be established by documents prepared by responsible officers or employees of KCI at about the time of the conduct in question or by testimony concerning statements made by responsible officers or employees of KCI. You must be careful, however, to distinguish between a party's intent to compete aggressively (which is lawful) and an intent to acquire monopoly power by using predatory, anticompetitive or exclusionary means.

Even if you decide that the evidence does not prove directly that KCI actually intended to obtain a monopoly, specific intent may be inferred from what KCI did. For example, if the evidence shows that the natural and probable consequence of KCI's conduct in the relevant market was to give KCI control over prices or to exclude or destroy competition, and that this was plainly foreseeable by KCI, then you may infer that KCI specifically intended to acquire monopoly power.

DANGEROUS PROBABILITY OF SUCCESS

In determining whether there was a dangerous probability of success, you should consider the following factors:

First, the market share and power of KCI as compared to competitors;

Second, whether KCI's share of the relevant market was increasing or decreasing;

Third, the actual or probable impact on competition of KCI's alleged predatory, anticompetitive or exclusionary acts or practices; and

Fourth, whether the barriers to entry into the market made it difficult for competitors to enter the market.

A dangerous probability of success need not mean that success was nearly certain. It means that the chance of success was substantial and real; that is, there was a reasonable likelihood that KCI would ultimately achieve its goal of monopoly power.

BUSINESS JUSTIFICATION

As part of your analysis of each party's antitrust claims, you must consider whether legitimate business reasons motivated the other party's conduct. This issue has two interrelated parts.

First, you should decide whether each business reason advanced by the party was legitimately competitive. A business justification is legitimate if it furthers competition on the merits, reduces prices, increases efficiency, enhances the quality or attractiveness of a product, increases efficiency by reducing costs or otherwise benefits consumers.

Second, if you find that any business reason satisfies this requirement, you may then consider whether each such reason is pretext—in other words, not the real reason for the party's

conduct. You are not, however, to second-guess whether the party's business judgment was wise or correct in retrospect.

The party asserting the claim has the burden of persuading you, by a preponderance of the evidence, that legitimate business reasons did not motivate the defending party's alleged conduct, even in part.

SHAM LITIGATION

Hill-Rom asserts that KCI pursued factually baseless or "sham" legal claims in attempt to monopolize the alleged submarkets defined in the instruction on Relevant Market. In response to Hill-Rom's counterclaim, KCI asserts that it brought the litigation that Hill-Rom complains of in order to seek a remedy for Hill-Rom's conduct.

The Constitution ensures the right of everyone, whether acting alone or in combination or agreement with others, to petition or appeal to the courts for judicial action, recognizing that when people do so, they will naturally seek judicial action that favors them and also may be unfavorable to others. The law provides that the right to use the courts to seek judicial action is an important right, and that the exercise of that right, even by agreement, does not normally violate the antitrust laws.

An agreement to bring or continue one or more lawsuits or other proceedings against a party does not violate the antitrust laws unless the suit or suits were shams. In determining whether the suit or other proceedings challenged by Hill-Rom were shams, you must decide (1) whether KCI's suits or other proceedings were objectively baseless; and (2) whether the allegedly baseless suits or other proceedings were an attempt to harass or interfere directly with the business relationships of one or more competitors through the use of governmental process as opposed to the outcome of the suits.

Just because a suit or other proceeding was unsuccessful does not mean that it was objectively baseless. A lawsuit or other proceeding is objectively baseless only if it was so baseless that no reasonable litigant could realistically expect to win. In other words, if someone in KCI's position could have had a reasonable belief that there was a chance of winning, the suits

or other proceedings were not objectively baseless. If you find that KCI's suits or other proceedings were not objectively baseless, you do not need to consider whether it was an attempt to interfere with the business relationships of one or more competitors. Instead, you must find for KCI and against Hill-Rom on its charges that KCI violated the Sherman Act by pursuing the suits or other proceedings.

If, however, you find that KCI's suits or other proceedings were objectively baseless, you must determine whether KCI's primary objective in bringing them was to hurt Hill-Rom by bringing or continuing them regardless of the ultimate outcome of the suits or other proceedings, or whether KCI's primary objective was to obtain the relief sought.

If you find that no reasonable person could have realistically expected to succeed in a suit or other proceeding such as the ones KCI initiated and that KCI's primary purpose in bringing or continuing them was to inflict harm on Hill-Rom caused by the suits or other proceedings themselves, as opposed to the relief sought, then you must consider whether KCI's actions constitute exclusionary conduct in pursuit of monopolization, *i.e.*, whether the remaining elements of Hill-Rom's attempt to monopolize claim have been proven.

The litigation and other proceedings that Hill-Rom complains about sought the following judicial relief: damages and injunctive relief. KCI contends that the true purpose in bringing the lawsuits or other proceedings was to secure this relief. Hill-Rom, on the other hand, maintains that KCI's true purpose in bringing the lawsuits or other proceedings was not to win a favorable judgment but to harass Hill-Rom, by the process of litigating, regardless of the outcome.

In considering KCI's purpose, you may consider whatever direct evidence of KCI's motivation for bringing the lawsuits or other proceedings is available to you. Of course, you also may consider circumstantial evidence of KCI's true purpose, such as whether KCI engaged in misrepresentations in the conduct of the lawsuits. If KCI engaged in misrepresentations in a judicial or other proceeding, you may consider that to be evidence of an improper purpose.

LOBBYING

Hill-Rom also asserts that KCI's communications with the Department of Justice were in furtherance of an attempt to monopolize the four alleged submarkets mentioned earlier in these

instructions. KCI asserts that its communications and cooperation with the Department of Justice investigation were proper. The Constitution ensures the right of everyone, whether acting alone or with others, to petition or appeal to the government for political action, recognizing that when people do so they will naturally seek political action that favors them and also may be unfavorable to others. The appeal to government may be direct such as a discussion or meeting with a government official or agency, or it may be indirect, such as a publicity or advertising campaign. The law provides that the right to petition the government for political action is an important right, and the genuine exercise of that right, even by combination or agreement, does not violate antitrust laws. Efforts genuinely intended to influence public officials to take official action do not violate the antitrust laws, even if the purpose of those efforts is to obtain official action that eliminates or reduces competition.

To be entitled to this protection, however, petitioning activity must be a genuine attempt to influence public officials to take official action. In other words, the purpose of the activities must actually be to obtain some official action from public officials. Petitioning activities are not protected if they are just a sham or a pretext to cover what is actually nothing more than an attempt to interfere directly with a competitor's business relationships.

You must therefore decide whether any of the petitioning activity in this case was genuine. The burden of proof on the question of the genuineness of the petitioning activity is on Hill-Rom; that is, it is Hill-Rom's burden to convince you that the petitioning activity, or some of it, was not genuine, in addition to proving the remaining elements of its attempt to monopolize claim.

ANTITRUST INJURY AND CAUSATION

A party must establish as a part of its antitrust claim that it suffered injury to its business or property by reason of the antitrust violation. The term "business" includes any commercial interest or venture. A party has been injured in its "business" if you find that it has suffered injury to any of its commercial interests or enterprises as a result of another party's antitrust violations. The term "property" includes anything of value that a party seeking damages for a violation of the antitrust laws owns or possesses. A party was injured in its "property" if you find

that anything of value that it owns or possesses has been damaged as a result of another party's antitrust violation. A party has been injured in its "property" if you find that it has lost money as a result of another party's antitrust violation.

In the course of normal, lawful competition, some businesses may suffer economic losses or even go out of business. The antitrust laws are violated only when unlawful competitive practices cause such economic losses. An injury to a business is the material result of an antitrust violation only when the act or transaction constituting the violation directly and in natural and continuous sequence produces, or contributes substantially to producing, the injury. In other words, a defendant's violation of the antitrust laws must be a direct, substantial and identifiable cause of the injury a plaintiff claims to have suffered. Proof of an antitrust violation does not necessarily mean a plaintiff was damaged. Proof of an antitrust violation and antitrust injury must be shown independently.

TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS - ELEMENTS

Hill-Rom claims that KCI committed acts constituting tortious or unlawful interference with Hill-Rom's prospective business relationships. In order to recover on this claim, Hill-Rom must prove each of the following elements:

First, a reasonable probability that Hill-Rom would have entered into a contractual relationship with a customer or customers;

Second, an independently tortious or unlawful act by KCI that prevented the relationship from occurring;

Third, KCI did such act with a conscious desire to prevent the relationship from occurring or KCI knew that the interference was certain or substantially certain to occur as a result of its conduct; and

Fourth, Hill-Rom suffered actual harm or damage as a result of KCI's alleged interference.

MATERIAL CAUSE

An antitrust plaintiff must show the defendant's wrongful actions materially contributed to an injury to the plaintiff's business. In some cases a jury may infer that the defendant's anticompetitive behavior was a material cause of the plaintiff's damages from the nature of the

behavior and the plaintiff's showing of loss. However, this showing may not be based on speculation. Rather, the required causal link must be proved as a matter of fact and with a fair degree of certainty.

PROXIMATE CAUSE

In connection with Hill-Rom's tortious interference claim, any damages must be proximately caused by KCI's alleged interference. "Proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

STATUTE OF LIMITATIONS

KCI asserts that the statute of limitations limits Hill-Rom's claims. A statute of limitations is a law that provides that a claim is barred if a plaintiff does not bring it within a prescribed period of time. The time period within which the claim must be brought begins when KCI allegedly committed an act that allegedly injured Hill-Rom's business.

The applicable statute of limitations period for attempted monopolization is four years. KCI asserts that Hill-Rom's claim for attempted monopolization is barred as to KCI's acts, if any, that allegedly injured Hill-Rom's business prior to October 31, 1992.

The applicable statute of limitations period for tortious interference with business relations is two years. KCI asserts that Hill-Rom's claim for tortious interference with business relations is barred as to KCI's acts, if any, that allegedly injured Hill-Rom's business prior to October 31, 1994.

KCI has the burden of proving the statute of limitations defense. In other words, KCI must prove by a preponderance of the evidence that Hill-Rom did not file suit within the applicable time period.

DAMAGES—CAUTIONARY INSTRUCTION

If any party has proven its claim against another party by a preponderance of the evidence, you must determine the damages, if any, to which that party is entitled. You should not interpret the fact that I have given instructions about a party's damages as an indication in any way that I believe that a particular party should, or should not, win this case. It is your task first to decide whether the other party is liable. I am instructing you on damages only so that you will have guidance in the event you decide that the other party is liable and that the complaining party is entitled to recover money from that party.

COMPENSATORY DAMAGES

If you find a party is liable, then you must determine the amount that is fair compensation for all of its damages.

These damages are called compensatory damages. The purpose of compensatory damages is to make a party whole - that is, to compensate a party for the damage that it has suffered. You may award compensatory damages only for injuries that a party proves were caused by the other party's allegedly wrongful conduct. You should not award compensatory damages for speculative injuries, but only for those injuries which a party has actually suffered or is reasonably likely to suffer in the future.

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that a party prove the amount of its losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you find them appropriate from the facts and circumstances in evidence.

MITIGATION OF DAMAGES

A party that claims damages resulting from the wrongful act of another has a duty under the law to use reasonable diligence to mitigate—to avoid or minimize those damages.

If you find that a party is otherwise entitled to damages, the party may not recover for any item of damage that it could have avoided through reasonable effort. If you find by a preponderance of the evidence that a party unreasonably failed to take advantage of an opportunity to lessen its damages, you should deny that party recovery for damages that it would have avoided had it taken advantage of the opportunity.

If you find KCI could have profitably met Hill-Rom's Incremental Discounts and failed to do so, you may regard KCI's failure to do so as a failure to mitigate damages. There is the same duty to mitigate damages in an antitrust case as in any other case.

You are the sole judge of whether the party acted reasonably in avoiding or minimizing its damages. An injured party may not sit idly by when presented with an opportunity to reduce its damages. However, no party is required to exercise unreasonable efforts or incur unreasonable expenses in mitigating damages. The party found to be liable has the burden of proving the damages that the party making the claim could have mitigated. In deciding whether to reduce a party's damages because of its failure to mitigate, you must weigh all the evidence in light of the particular circumstances of the case, using sound discretion in deciding whether the liable party has satisfied its burden of proving that the damaged party's conduct was not reasonable.

DAMAGES – LOST PROFITS

Profits are gain which is in excess of all expenses, costs, and other operating expenses and the like.

FUTURE DAMAGES

KCI has presented evidence that, had it not been for Hill-Rom's alleged antitrust violation, KCI would have earned certain profits several years into the future. In calculating any damages award for KCI resulting from Hill-Rom's conduct, you may consider any amount of damages that were said to relate to alleged future profits.

III. CONCLUDING INSTRUCTIONS

When you retire to the jury room to deliberate on your verdict, you may take with you this charge and the exhibits that the Court has admitted into evidence. Select your Presiding Juror and conduct your deliberations. If you recess during your deliberations, follow all of the instructions

that I have given you concerning your conduct during the trial. After you have reached your unanimous verdict, your Presiding Juror must fill in your answers to the written questions and sign and date the verdict form. Return this charge together with your written answers to the questions. Unless I direct you otherwise, do not reveal your answers until such time as you are discharged. You must never disclose to anyone, not even to me, your numerical division during your deliberations on any question.

It is your sworn duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case, do not hesitate to re-examine your own opinion and change your mind if you become convinced that you are wrong. However, do not give up your honest beliefs solely because the others think differently, or merely to finish the case.

Remember that in a very real way you are the judges--judges of the facts. Your only interest is to seek the truth from the evidence in the case. In this and any lawsuit, the credibility of witnesses is important. You are the sole judges of whether to believe or disbelieve all, part or none of the testimony of any witness.

If you want to communicate with me at any time, please give a written message or question to Mr. Martinez, who will bring it to me. I will then respond as promptly as possible either in writing or by having you brought into the courtroom so that I can address you orally. I will always first show the attorneys your question and my response before I answer your question.

After you have reached a verdict, you are not required to talk with anyone about the case unless I order you to do so, but you may talk about the case with others after the case is over if you choose to do so.

FRED BIERY
UNITED STATES DISTRICT JUDGE

Date